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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1942, TERM

No. 279

DUBUQUE FIRE & MARINE INSURANCE COMPANY,
Petitioner,

v.

REYNOLDS COMPANY, INC., AND HOME INSURANCE COMPANY OF NEW YORK, *Respondents*

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit

AND BRIEF IN SUPPORT THEREOF

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THE MATTER INVOLVED

Summary of the Matter Involved

The matter involved is the correctness of a decision of the Circuit Court of Appeals holding that a policy of excess fire insurance upon property also covered by a policy of specific insurance against fire is not other insurance within the mean-

ing of a provision in the specific policy providing for forfeiture if the insured then has, or thereafter procures, any other contract of insurance, whether valid or not, covering the insured property.

Short Statement of the Matter Involved

The respondent Reynolds Company, Inc., a Texas corporation, owned a chain of variety stores in Texas and Louisiana (R. p. 76). The petitioner, Dubuque Fire & Marine Insurance Company, an Iowa corporation, issued to Reynolds Company, Inc., certain fire insurance policies covering the stock of merchandise and fixtures in its Goose Creek, Texas, store, providing for $5,000.00 coverage on the merchandise and $2200.00 coverage on the fixtures (R. pp. 2-4). These policies were regular standard Texas fire insurance policies, and each contained a provision that the entire policy should be void "if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on the property covered in whole or in part by this policy" (R. pp. 83-106). Premiums on these policies were stipulated amounts agreed on in advance (R. pp. 83, 89, 95, 106).

Thereafter, during the term of the Dubuque policies, Reynolds Company, Inc., without the knowledge or consent of the Dubuque Company (R. pp. 57, 58 and 117-118), procured from respondent Home Insurance Company of New York, a New York corporation, a policy of insurance insuring it against loss by fire to the stock and fixtures in all of its stores, including the Goose Creek store (R. pp. 109-112). This was a so-called reporting-form policy, calling for premiums to be based upon the fluctuating values of the property covered, such values to be reported from time to time by the insured and the premium then calculated (R. pp. 109-112). The Dubuque policies on the Goose Creek store were not cancelled upon the issuance of the Home policy, but it

was provided in the Home policy (R. p. 108, Par. 9), and by agreement between the Home and Reynolds Company, Inc. (R. p. 70), that the Home policy would operate as excess insurance on the Goose Creek store and afford protection only after the specific insurance provided by the Dubuque policies should be exhausted. The Home policy afforded to the insured fire insurance coverage of $7600.00 on the merchandise and fixtures at the Goose Creek store, over and above the $7200.00 coverage provided by the Dubuque policies, giving the insured a total of $14,800.00 insurance on the Goose Creek store (R. pp. 69-70).

A fire occurred at the Goose Creek store during the term of both sets of policies, resulting in damage which the three parties thereafter stipulated to amount to $4483.00 (R. pp. 48-51). The Dubuque, however, took the position that its policies had been violated because of the taking of other insurance without its knowledge and consent, and the Home contended that nothing was due under its policy since the specific insurance had not been exhausted.

Suit was brought in one of the state courts of Texas by Reynolds Company, Inc., against the two insurance companies (R. pp. 1-13). Petitioner removed this suit to the United States District Court for the Eastern District of Texas. The two insurers answered, defending substantially upon the contentions just above mentioned (R. pp. 26-40). Judgment in the District Court, upon a trial without a jury, was for the insured against the Dubuque for the agreed loss of $4483.00, and that the insured take nothing as against the Home (R. pp. 124-126).

Your petitioner took an appeal to the Honorable Circuit Court of Appeals for the Fifth Circuit, in which court it attacked the judgment of the District Court, with the contention that the Home policy, though excess insurance, nevertheless afforded the insured protection against loss to the extent of the sum of the face of the Dubuque policies, plus the face

of the Home policy, giving the insured coverage aggregating $14,800.00 instead of the $7,200.00 provided for in the Dubuque policies, thereby decreasing the insured's motive to be diligent in the protection of his property; and that the Home policy violated, in spirit and letter, the provision of the Dubuque policies against other insurance and actually constituted another contract of insurance upon the property covered by the Dubuque policies (R. p. 136).

The majority opinion of the Circuit Court of Appeals (by CIRCUIT JUDGE MCCORD) held that the excess insurance coverage for the Goose Creek store provided by the Home policy did not constitute other insurance within the inhibition of the forfeiture provision of petitioner's policies, the reasoning being, as petitioner construes it, that the Home policy "only took hold and commenced to cover where the Dubuque policies left off;" that the so-called moral hazard was not increased by the existence of the Home policy; and that there was, therefore, no "other insurance" (R. pp. 134-138). The dissenting opinion (by CIRCUIT JUDGE HUTCHESON) held that the Home policy constituted other insurance, and was based, first, upon the proposition that the Home policy, under its terms, was really additional insurance to any other insurance on the property, though not called upon to pay until the original insurance should first be exhausted; and, second, upon the proposition that the Dubuque policies flatly prohibited any other contract of insurance upon property covered in whole or in part by the Dubuque policies (R. pp. 138-140).

Your petitioner's petition for rehearing was overruled by the Circuit Court of Appeals (R. p. 146).

The provision of the Dubuque policies here involved reads as follows:

"Subject to Article 4890, Revised Statutes of Texas,[1]

[1] This Article, admittedly not relevant here, reads:

this entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; * * * ." (Lines 21-23, R. p. 84.)

The clause from the Home policy here involved reads:

"9. Excess Clause—This policy does not attach to or become insurance against any hazard upon property herein described, which, at the time of any loss, is insured as defined by the specific insurance clause, until the liability of such specific insurance has been exhausted, and then shall cover only such loss or damage as may exceed the amount due from such specific insurance (whether valid or not, and whether collectible or not) after application of any contribution, co-insurance, average, or distribution, or other clauses contained in policies of such specific insurance affecting the amount collectible thereunder, not, however, exceeding the limits as set forth herein" (Par. 9, R. p. 108).

Basis of Jurisdiction of This Court

The date of the judgment to be reviewed is June 3, 1942 (R. p. 134).

The statutory provision which is believed and contended to sustain the jurisdiction of this court is Subdivision (a) of Section 240 of the JUDICIAL CODE, amended, being Title 28, Section 347(a), U. S. CODE ANNOTATED.

The judgment is that of one of the Circuit Courts of Appeals in a civil action, being a suit by citizens of Texas against

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"Any provision in any policy of insurance issued by any company subject to the provisions of this law to the effect that if said property is encumbered by a lien of any character or shall after the issuance of such policy become encumbered by a lien of any character, then such encumbrance shall render such policy void, shall be of no force and effect. Any such provision within or placed upon any such policy shall be null and void."

citizens of Iowa and New York upon policies of fire insurance in an amount in excess of $3000.00, exclusive of interest and costs (R. pp. 124-126).

The Question Presented

It is contended by petitioner that the Circuit Court of Appeals was in error in holding that the policy of excess insurance issued by respondent Home Insurance Company of New York to respondent Reynolds Company, Inc., was not such another contract of insurance as to violate that provision of the policies of petitioner providing that they should be void if the insured should make or procure "any other contract of insurance" upon property covered in whole or in part by petitioner's policies.

The question presented, therefore, is the correctness of the Circuit Court of Appeals in making such holding and in thereby affirming the judgment of the District Court.

The question presented was raised by the answer of the petitioner in the District Court (R. pp. 28-29), and duly carried forward on appeal (R. pp. 143-144).

Reasons Relied on for the Allowance of the Writ

The decision of the Circuit Court of Appeals, by holding that a policy of excess insurance against fire, which in fact extends to the insured additional insurance and further protection in the event his loss is established at a figure greater than the limits of his primary or specific policies of fire insurance, does not increase the moral hazard of the company carrying the primary policy and does not amount to other insurance within the inhibition of a clause of the primary policies forbidding the insured from procuring any other contract of insurance upon the property covered in whole or in part by the policies:

(a) Is a decision of an important question of local law in a way probably in conflict with applicable local decisions, such as BOATNER v. PROVIDENT-WASHINGTON INSURANCE CO. (Tex. Com. App.), 241 S.W. 136; HOME INSURANCE CO. OF NEW YORK v. LAKE DALLAS GIN CO. (Tex. Com. App.), 93 S.W. (2d) 388; and BRITISH AMERICA ASSURANCE CO. v. MID-CONTINENT LIFE INSURANCE CO. (Tex. Com. App.), 37 S.W. (2d) 742.

(b) Is such a decision that there are special and important reasons sufficient to invoke this court's discretion to review the judgment on writ of certiorari.

These reasons are discussed in the supporting brief annexed to this petition.

Prayer

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Firth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the Circuit Court of Appeals had in the case numbered and entitled on its docket 9887, Dubuque Fire & Marine Insurance Company, Appellant, v. Reynolds Company, Inc., and Home Insurance Company of New York, Appellees, to the end that this cause may be reviewed and determined by this Court, as provided by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court; and for such further relief as this Court may deem proper.

Dated July 27, A. D. 1942.

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